

VIRGINIA LAND CONSERVATION FOUNDATION
Land Preservation Tax Credits – Conservation Value Review Criteria
Adopted November 21, 2006 and amended August 7, 2008

As of January 1, 2007, the Department of Conservation and Recreation (DCR) became responsible for conducting reviews of the conservation value of applications requesting \$1 million or more in state Land Preservation Tax Credits (LPC). This responsibility was given to DCR by the Governor and the Virginia General Assembly pursuant to the 2006 amendments to the Virginia Land Conservation Incentives Act of 1999 (Virginia Code § 58.1-512).

This document sets out the criteria adopted by the Virginia Land Conservation Foundation in November of 2006 and amended in August of 2008, pursuant to Virginia Code § 58.1-512(D)(3), that the Director of the Department of Conservation and Recreation (DCR) will use to verify to the Department of Taxation in advance of Taxation issuing a LPC, the conservation value of donated land or conservation easements or other less-than-fee interests in land that result in tax credit applications that claim \$1 million or more in credits from a donation equal to or greater than \$2.5 million. Any land transaction claiming less than the \$1 million tax credit does not require a DCR review.

Donors whose applications for tax credits are verified for conservation value by DCR should be aware that they remain responsible for full compliance with applicable federal and state requirements. Donations certified as compliant with the DCR criteria will remain subject to later audit by the Virginia Department of Taxation for items not covered by the criteria (notably, but not limited to, valuation standards). In addition, donors claiming federal tax incentives will remain subject to audit by the Internal Revenue Service.

Donations of land in fee simple

To qualify for a tax credit, any donation of a fee simple interest in real property to a public or private conservation agency (including a bargain sale) that involves a tax credit application for \$1 million or more must be documented with adequate information demonstrating that the agency's ownership of the land provides conservation value to the Commonwealth in accordance with the requirements of Va. Code § 58.1-512.

Donations of less-than-fee interests in land

To qualify for a tax credit under Virginia Code § 58.1-512, any donation of a less-than-fee interest in real property (known more commonly as a "conservation easement") that involves a tax credit application for \$1 million or more must meet the conservation values criteria set out in Sections A, B, and C below:

- Conservation purpose;
- Public benefit; and
- General water quality and forest management.

A. **Conservation Purpose:** The donated land or conservation easement must be conveyed for at least one of the following eight Conservation Purposes, pursuant to Virginia Code § 58.1-512(A) and Internal Revenue Regulations § 1.170A-14. The applicant can select as many

Conservation Purposes as apply, but is only required to have one verifiable Conservation Purpose to meet the DCR review. Each category within this section includes “safe harbors” that will meet the conservation purpose for that category.

Donations of land or conservation easements expressly given for one or more conservation purposes outlined in this section of the Criteria (as listed below in A.1 through A.8) that are accepted or approved by the Virginia Outdoors Foundation, the Department of Historic Resources, the Department of Forestry, the Department of Conservation and Recreation, or the Department of Game and Inland Fisheries will be presumed to meet the conservation purpose contained in this section.

Easements must protect the conservation purpose indicated in perpetuity. Lands indicated to have a conservation purpose of either agricultural or forestal use are not required to remain in agricultural or forestal production, however the easement must ensure that agricultural or forestal use remains a viable option in perpetuity.

1. Agricultural Use. A land area of five contiguous acres or more devoted to production for sale of plants or animals under standards prescribed by the Commissioner of Agriculture and Consumer Services, or land devoted to a soil conservation program under an agreement with an agency of the federal government.¹

a. The following lands will meet the safe harbors for conservation purpose for the agricultural use category.

(1) Land that a county, city or town has designated as real estate devoted to agricultural or horticultural use for purposes of use value assessment and taxation pursuant to Virginia Code § 58.1-3230.

(2) Land that is part of an agricultural or agricultural and forestal district pursuant to Virginia Code § 15.2-4300 or § 15.2-4400.

(3) Land that the governing body of any county, city or town, with the cooperation of the United States Department of Agriculture, has designated as important farmland within its jurisdiction pursuant to Virginia Code § 3.1-18.5(B).

b. Other lands will meet the conservation purpose for this category, if the taxpayer demonstrates the conservation value of the land for agricultural uses.

2. Forestal Use. Land used for tree growth and maintained as a forest area.

a. Land used for tree growth means an area of at least 20 contiguous acres from which livestock has been excluded and that meets one of the following conditions:²

(1) The land contains existing, well distributed, and commercially valuable trees. Land used for tree growth that has been recently harvested of merchantable timber, is regenerating into a new forest, and has not been developed for non-forest use will qualify.

¹ 2 Virginia Administrative Code (VAC) 5-20

² 4VAC10-20

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- (2) The land has trees but is not capable of growing a commercial timber crop because of inaccessibility or adverse site conditions such as steep outcrops of rock, shallow soil on steep mountainsides, excessive steepness, heavily eroded areas, coastal beach sand, tidal marsh and other site or environmental conditions.
 - b. The following lands will meet the safe harbors for conservation purpose for the forestal use category.
 - (1) Land that a county, city or town has designated as real estate devoted to forestal use for purposes of use value assessment and taxation pursuant to Virginia Code § 58.1-3230.
 - (2) Land that is part of a forestal or agricultural and forestal district pursuant to Virginia Code § 15.2-4301 or §15.2-4401.
 - (3) Land that contains 20 acres or more of forest area that is adjacent to lands owned or managed by the United States Forest Service or the Virginia Department of Forestry.
 - (4) Land that contains less than 20 acres of forest area, provided that the land has greater than 50% canopy coverage and has been certified by the State Forester in consultation with the local city or county arborist, if such a position exists within the locality, as important to the establishment and preservation of urban forests, pursuant to Va. Code § 10.1-1105.
 - c. Other lands will meet the conservation purpose for this category, if the applicant demonstrates the conservation value of the land for forestal use.
 - 3. Natural Habitat and Biological Diversity. Land that contains significant natural habitats and/or ecosystems that support native plant and animal species and protect a relatively natural habitat of fish, wildlife, plants, or similar ecosystems, including natural areas and natural heritage resources as defined below.
 - a. For the purposes of this category, the following definitions apply.
 - (1) Natural area – any area of land, water, or a combination thereof, that retains or has reestablished its natural character, though it need not be completely natural and undisturbed; or which is important in preserving rare or vanishing flora, fauna, native ecological systems, geological, natural historical, scenic or similar features of scientific or educational value benefiting the citizens of the Commonwealth.³
 - (2) Natural heritage resource – The habitat of rare, threatened, or endangered plant and animal species, rare or state significant natural communities or geologic sites, and similar features of scientific interest, as identified by the Department of Conservation and Recreation's Virginia Natural Heritage Program.⁴

³ Virginia Code § 10.1-209

⁴ Virginia Code §10.1-209

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- (3) Significant natural habitat – Areas that represent high quality examples of a terrestrial community or aquatic community; caves, or areas which are included in, adjacent to, or which contribute to the ecological viability of a local, regional, state, or national park, nature preserve, wildlife refuge, wilderness area or other similar conservation area.⁵
 - b. The following lands will meet the safe harbors for conservation purpose for the natural habitat and biological diversity conservation category.
 - (1) Lands identified in writing by the Department of Conservation and Recreation’s Virginia Natural Heritage Program as necessary to protect natural heritage resources.
 - (2) Lands identified in writing by the Department of Game and Inland Fisheries as significant wildlife habitat, the protection of which would further implementation of the Comprehensive Wildlife Conservation Strategy (also known as Virginia’s Wildlife Action Plan).
 - (3) Undeveloped lands located within or adjacent to local, regional, state or federal lands managed primarily for their natural habitat and biological diversity.
 - c. Other lands will meet the conservation purpose for this category, if the applicant demonstrates the conservation value of the land for natural habitat and biological diversity.
 - 4. Historic Preservation. Land that contains historic landmarks, including buildings, structures, objects, sites, and landscapes, that constitute historic, archaeological, and cultural resources of significance as determined by the Virginia Department of Historic Resources. Visual or other access by the general public on a periodic basis is required to qualify under this category.⁶
 - a. The following properties will meet the safe harbors for conservation purpose for the historic preservation category.
 - (1) Properties individually listed in the Virginia Landmarks Register or the National Register of Historic Places.
 - (2) Properties that have been determined by the Virginia Department of Historic Resources to be eligible for listing in the Virginia Landmarks Register and/or recommended for listing in the National Register of Historic Places.
 - (3) Properties that are contributing resources within historic districts that are listed in the Virginia Landmarks Register and/or National Register of Historic Places.
 - (4) Any battlefield that meets the above standards and/or is listed by the Civil War Sites Advisory Commission Report of 1993, as amended.

⁵ 26 Code of Federal Regulations (CFR) §1.170A-14(d)(3)

⁶ 26 CFR §1.170A-14(d)(5)

b. Other properties may meet the conservation purpose for historic preservation if the applicant demonstrates the conservation value of the resource for historic preservation and provides documentation from the Virginia Department of Historic Resources to support such a claim.

5. Natural-Resource Based Outdoor Recreation or Education. Lands devoted to and available for natural-resource based outdoor recreation by, or education of, the general public. Access for substantial and regular use by the general public is required to qualify under this category.⁷

a. For the purposes of this category, land devoted to and available for natural-resource based outdoor recreation or education means parks, trails, greenways or similar recreational areas, open for public use, except any use operated primarily as a business with intent for profit.⁸ Examples include a water area for the use of the public for boating or fishing, or a nature or hiking trail for the use of the public.⁹

b. Lands will meet the conservation purpose for this category if the applicant demonstrates the conservation value of the land for natural-resource based outdoor recreation or education, such as lands identified in the Virginia Outdoors Plan.

c. The following lands will not meet the conservation purpose for natural-resource based outdoor recreation or education:

(1) Lands where development (for example, buildings, roads, or parking lots) covers more than 15% of the site (paved trails and boardwalks are excluded from this calculation).

(2) Lands used for commercial recreational or amusement places, such as athletic fields or stadiums, driving ranges, golf courses, private beaches or pools, marinas, motor speedways, drag strips, or amusement parks.

(3) Private membership clubs, including golf or country clubs, private beaches or pools, or lands available for use only for residents of an associated development or subdivision (that is, not the general public).¹⁰

6. Watershed Preservation. Substantially undeveloped land that, by virtue of its size or by virtue of its location adjacent to rivers, streams, or other waterways, serves to protect water quality and/or quantity, hydrological integrity, riparian and/or aquatic habitat, or public drinking-water supplies. Examples, defined below, include floodplains, wetlands, vegetated buffers, sinking streams, and groundwater recharge areas.

a. For the purposes of this category, the following definitions apply.

(1) Floodplains – Lands that are used for the passage or containment of waters, including the floodplains or valleys/side slopes of streams that are or may be

⁷ 26 CFR §1.170A-14(d)(2)

⁸ 4VAC5-20-20(A)

⁹ 26 CFR §1.170A-14(d)(2)

¹⁰ 4VAC5-20-20(A)

subject to periodic or occasional overflow, such as floodplains identified by engineering surveys by the U.S. Corps of Engineers, the Federal Emergency Management Agency, or others. Floodplains also include coastal lowlands, such as bays, estuaries or ocean shores, subject to inundation by storms or high tides.¹¹

(2) Wetlands – Lands with characteristic hydric soils that are inundated or saturated by surface or ground water at a frequency or duration sufficient to support, and that under normal conditions does support, a prevalence of vegetation typically adapted for life in saturated soil conditions.¹²

(3) Vegetated buffers – An area of land along a river, stream, wetland, or other waterway where natural vegetation is maintained and degradation by livestock is prevented.

(4) Groundwater recharge areas – Lands that, by virtue of a combination of topography, soils, and underlying geology are important to the recharge of local or regional groundwater supply and have been identified as such by local, state, or federal agencies.

(5) Sinking streams – Perennial or intermittent streams that sink into the underlying karst features.

b. The following lands will meet the safe harbors for conservation purpose for the watershed preservation category.

(1) Lands containing significant wetland acreage mapped on the U.S. Fish and Wildlife Service's National Wetland Inventory or other wetlands with delineations approved by the U.S. Army Corps of Engineers and/or the Virginia Department of Environmental Quality.

(2) Lands containing vegetated buffers of at least 100 feet in width with substantial frontage on a perennial stream, wetland, or tidal waters.

(3) Lands adjacent to reservoirs used for public drinking water supplies or within 1,000 feet of a public drinking water well.

c. Other lands will meet the conservation purpose for this category if the applicant demonstrates the conservation value of the land for watershed preservation. For example, lands identified by a local, state, or federal agency as important groundwater recharge areas, sinkholes receiving channelized surface flow, sinking streams and springs, each with vegetated buffers of at least 35 feet, or lands located within an identified Special Flood Hazard Area mapped by the Federal Emergency Management Agency¹³ may meet the conservation purpose for this category.

¹¹ 4VAC5-20-20(C)

¹² Virginia Code § 58.1-3666

¹³ 12 CFR § 339.2

d. Wetlands created, restored, or protected for the purposes of providing compensation pursuant to a regulatory requirement will not meet the conservation purpose for the watershed preservation category.

7. Preservation of Scenic Open Space. Lands that contain views, vistas, or characteristics that contribute to, and are compatible with, the scenic character or enjoyment of the surrounding landscape. Visual access to or across the property from public lands or publicly accessible water bodies or lands, including roads or trails, is required to qualify under this category.

a. The following lands will meet the safe harbors for conservation purpose for the scenic preservation category.

(1) Lands adjacent to or visible from a State Scenic Highway, pursuant to Virginia Code § 33.1-64, or a Virginia Byway, pursuant to Virginia Code § 33.1-63.

(2) Lands adjacent to or visible from a federally designated Wild and Scenic River or American Heritage River in or adjacent to Virginia, or a State Scenic River pursuant to Virginia Code § 10.1-400.

(3) Lands adjacent to, or visible from public parks or public hiking, biking, or riding trails.

(4) Lands officially designated as scenic by a local, state or federal agency, provided that in each case the designating agency supplies a specific description of the lands or area so designated or recommended.¹⁴

b. Other lands will meet the criteria for this category if the applicant demonstrates the conservation value of the land for preservation of scenic open space. For example, lands adjacent to or visible from publicly accessible water bodies, public roads, or permanently protected lands provided that there is visual access for the public may meet the conservation purpose for this category. Where visual access to the property is not available, physical access may be used to demonstrate the conservation value of the land for preservation of scenic open space.

8. Conservation and Open Space Lands Designated by Local Governments. Lands that contain features, resources, values, or other attributes that a local government has officially designated as important to protect from inappropriate development so as to help shape the character, direction and timing of development in the area.

a. To qualify under this category, a local government must have adopted, in an official public ordinance or comprehensive plan, one of the following as worthy of protection:

(1) the specific property in question;

(2) a specific land area that contains the property in question;

(3) a designated class of land with specific, identified conservation value, defined by use, location, and attributes; or

¹⁴ 4VAC5-20-20(F)(3)

(4) land that is used as a public garden such as a shared green space for the use of the entire community for raising flowers, vegetables, fruit, or other produce.

- b. A general statement of conservation goals may support verification of this conservation purpose, but is not sufficient on its own to qualify under this category.¹⁵

B. Public Benefit

1. The terms of every deed of conservation easement submitted for DCR review must contain terms and restrictions that protect the conservation purpose(s) of the land in perpetuity.
2. The terms of every deed of conservation easement submitted for DCR review must prohibit intentional destruction or significant alteration of the conservation values of the protected property other than for general maintenance or restoration, or for activities deemed necessary for safety considerations.
3. The terms of every deed of conservation easement submitted for DCR review must ensure that the conservation value of the property will not be adversely affected by future subdivision or development of the property. To ensure the protection of conservation value, the easement must include the following provisions:
 - a. limitations on the number of permitted subdivisions on the property;
 - b. limitations on the amount of permitted new buildings and structures, either by placing a limit on the number of new buildings or structures and placing individual limits on the size of those buildings or structures, or by placing a limit on the collective footprint of all buildings and structures; or by some combination of those approaches;
 - c. restrictions on the location of permitted new buildings and structures, either through the use of building envelopes, no-build zones, or through required review and approval by the easement holder of the location of new buildings and structures prior to construction;
 - d. restrictions on the location of permitted new roads or access ways, either through use of pre-approved routes, no-road zones, or through required review and approval by the easement holder of new roads or access ways prior to construction (however, roads or access ways for public safety needs or for permitted uses such as farming or forestry may be constructed and maintained); and
 - e. limitations on alterations, demolition, or ground-disturbing activity that may impact cultural or natural heritage resources.
4. Donated property must not have been dedicated as open space in, or as part of, a residential or commercial subdivision or development, or dedicated as open space for the purpose of fulfilling density requirements to obtain approvals for zoning, subdivision, site plan, or building permits.

¹⁵ 26 CFR §1.170A-14(d)(4)

C. General Water Quality and Forest Management

For tax-credit applications submitted to DCR, the deed of conservation easement must ensure the protection of water quality and forest resources through the inclusion of the following terms and restrictions, where applicable.

1. Rivers, Streams, Wetlands, Springs, or Shorelines:

Maintaining proper vegetated buffers is important for water quality protection. Scientific evidence indicates the wider the buffer, the greater the value for nutrient reduction and sediment removal, as well as for wildlife diversity and habitat. Donors are encouraged to work with the easement holders to maximize the water-quality benefits provided by the donated property. A mixture of trees, shrubs, and grasses has been shown to be most effective at protecting water quality, but the criteria do not require the buffer to include all three.

If the property contains or includes wetlands or frontage on a perennial stream or river (as depicted by a solid blue line on the USGS 7.5' topographic map), sinking streams (as defined above in section A.6.a.(5)), lakes, tidal waters, ponds, or other waterbodies, the following minimum protections for those resources apply.

- a. Conservation easement terms must require a vegetated buffer (as defined above in section A.6.a.(3)) that is at least 35 feet wide, unless a wider buffer is required by local, state, or federal law or regulations. A vegetated buffer is required for a pond only if the pond has a perennial stream flowing from it.
- b. To qualify as a buffer under these criteria, the deed of conservation easement must:
 - (1) prohibit within the buffer construction of new buildings or structures and roads (however, existing buildings or structures, reconstruction of documented historic buildings and structures on historic properties, and certain water-dependent structures such as docks are permissible, as are existing roads, limited stream crossings, and limited access points);
 - (2) restrict within the buffer other soil disturbance, including plowing (however, tree planting, forest management in accordance with Virginia's Forestry Best Management Practices for Water Quality Guide, archaeological investigations, and restoration, reconstruction, and maintenance of documented historic landscapes on historic properties are permissible);
 - (3) require a buffer of vegetative cover that includes, but is not limited to, forest, shrubs, or warm-season grasses. Lawns or grazed pastures shall not constitute vegetative cover for the purposes of this provision. However, the buffer area may be mowed up to three times in one calendar year. Historic landscapes as verified by the Department of Historic Resources may be restored or reconstructed and maintained. In addition, control of non-native vegetation or removal of diseased trees within the buffer is permissible.
 - (4) restrict regular livestock grazing within the buffer (however, limited designated points for crossing are permissible in accordance with a written conservation plan

pursuant to C2). Methods for excluding livestock by fencing must be effective; however, they do not need to conform to NRCS standards.

2. Land Used for Agricultural Production: If the property contains lands in agricultural use as defined above in section A.1, then the deed of conservation easement shall require implementation of a written conservation plan that stipulates the use of best management practices (such as proper nutrient management, utilization of cover crops, and stabilization of highly erodible lands). This plan shall be developed in consultation with the local Soil and Water Conservation District or the Natural Resources Conservation Service representative and shall be implemented as long as the lands remain in agricultural production. [More information on conservation plans may be found at the Natural Resources Conservation Service's website <http://www.nrcs.usda.gov/> including a brochure at <http://www.ri.nrcs.usda.gov/conservation.html>, and contact information for the Soil and Water Conservation Districts is available on DCR's website at http://www.dcr.virginia.gov/soil_&_water/swcds.shtml.]
3. Management Plans for Forestlands: If the property contains 20 acres or more of forest lands, as defined above in section A.2.a, then the deed of conservation easement shall require that the landowner has a current written forest management plan or Virginia Forest Stewardship Plan in place prior to the commencement of timber harvesting or other significant forest management activities. The deed of conservation easement shall require the forest management plan to include a provision that all forest management and harvesting activities be developed by, or in consultation with, the Virginia Department of Forestry, or be consistent with Virginia's Forestry Best Management Practices for Water Quality Guide.